Yap Bell Pung & Anor v Ong Beng Cheng & Ors

HIGH COURT (MELAKA) — SIVIL SUIT NO MT1–22–108 OF 2003
LOW HOP BING J
1 SEPTEMBER 2005

Civil Procedure — Pleadings — Striking out — Whether pleadings ought to be struck out — Rules of The High Court 1980 O 18 r 19(1)(b) or (d)

The second plaintiff's ('P2') claim against the second defendant ('D2') and the third defendant ('D3') was primarily based on libel allegedly contained in two statutory declarations affirmed by D2 and D3 respectively. These statutory declarations refered to the statutory declaration of the first defendant ('D1') who stated, inter alia, that all the three defendants went to the Melaka High Court to bid for three pieces of land in a public auction, for which D1 deposited a bank draft as the bidder's deposit. It was said that the first plaintiff ('P1') was allegedly as agent of a company known as Pernara Jaya Sdn Bhd ('the company') of which P2 was at the material time a director and shareholder, and that P1 had failed to pay D1, D2 and D3 the sum of money which P1 and, by implication, the company had allegedly promised in order to induce them to withdraw from bidding at the public auction. P2's claim was also allegedly based on the torts of malicious prosecution and abuse of process in the form of numerous averments pleaded in the statement of claim. D2 and D3 sought an order to strike out with costs the writ and statement of claim of P2 under O 18 r 19(1)(b) or (d) of the Rules of the High Court 1980 ('theRHC') and also under the inherent jurisdiction of the court. The learned registrar dismissed the order. Hence, D2 and D3 appealed.

Held, dismissing the appeals with costs:

(1) In relation to O 18 r 19(1)(b) or (d), P2's pleading or indorsement in the writ may only be struck out on the ground that it was scandalous, frivolous or vexatious, ie where it is wholly unnecessary or irrelevant or obviously unsustainable: *Boey Oi Leng v Trans Resources Corp Sdn Bhd* [2001] MLJU 566; or it is otherwise an abuse of the process of the court (see para 10).

(2) It was eminently unsuitable for P2's claim to be struck out as they were not obviously unsustainable. They were outside the ambit of O 18 r19(1)(b) or (d) (see para 13).

(3) However, whether P2 was able to show any merit in his claim against D2 and D3 remained to be determined after a full trial. Therefore the learned registrar was correct in dismissing the application of D2 and D3 (see para 14).

[**Bahasa Malaysia summary**

Tuntuan plaintif kedua ('P2') terhadap defendan kedua ('D2') dan defendan ketiga ('D3') adalah secara utamanya berdasarkan libel yang didakwa terkandung dalam dua deklarasi statutori yang diikrarkan oleh D2 dan D3 masing-masing. Deklarasi statutori ini merujuk kepada deklarasi statutori defendan pertama ('D1') yang menyatakan, inter alia, bahawa semua tiga defendan telah pergi keMahkamah Tinggi di Melaka untuk membida bagi tiga bidang tanah dalam satu lelongan awam, yang mana D1 telah mendepositkan satu deraf bank sebagai deposit pembida. Dikatakan bahawa plaintif pertama ('P1') adalah agen bagi satu syarikat yang dikenali sebagai Pernara Jaya Sdn Bhd ('syarikat tersebut') yang mana P2 pada masa yang material merupakan pengarah dan pemegang sahamnya, dan P1 telah gagal untuk membayar D1, D2 dan D3 sejumlah wang yang P1, dan secara implikasi, syarikat tersebut telah janjikan untuk memujuk mereka untuk menarik diri daripada membida dalam lelongan awam tersebut. Tuntutan P2 juga dikatakan berasaskan kepada tort pendakwaan niat jahat dan salah guna proses dalam bentuk pelbagai penyataan yang diplidkan dalam penyata tuntutan. D2 dan D3 memohon perintah untuk membatalkan writ dan penyata tuntutan P2 dengan kos di bawah A 18 k 19(1)(b) atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan juga di bawah bidangkuasa sedia ada mahkamah. Pendaftar yang arif telah menolak perintah tersebut. Oleh itu, D2 dan D3 merayu.

Diputuskan, menolak rayuan dengan kos:

(1) Berkenaan dengan A 18 k 19(1)(b) atau (d), pliding atau endorsmen P2 dalam writ hanya boleh dibatalkan atas alasan bahawa ianya berniat jahat, remeh atau menyusahkan, ie di mana ianya adalah langsung tidak perlu atau tidak relevan atau secara terang-terangan tidak boleh diterima: *Boey Oi Leng v Trans Resources Corp Sdn Bhd* [2001] MLJU 566; atau ianya merupakan salah guna proses mahkamah (lihat perenggan 10).

(2) Ianya adalah sangat tidak bersesuaian untuk membatalkan tuntutan P2 kerana ianya bukan secara terang-terangan tidak boleh diterima. Ia adalah di luar lingkungan A 18 k 19(1)(b) atau (d) (lihat perenggan 13).

(3) Walau bagaimanapun, sama ada P2 berupaya untuk menunjukkan sebarang merit dalam tuntutannya terhadap D2 dan D3 perlu diputuskan dalam perbicaraan penuh. Oleh itu, pendaftar yang arif adalah betul dalam menolak permohonan D2 dan D3 (lihat perenggan 14).]

Notes

For cases on striking out of pleadings, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4677–4737.

Cases referred to

Abu Samah bin Omar v Zainal bin Montel [2004] 5 MLJ 377 (refd)
Ayob Saud v TS Sambanthamurthi [1989] 1 MLJ 315 (refd)
Bandar Builder Sdn Bhd & 2 Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36 (refd)
Boey Oi Leng v Trans Resources Corp Sdn Bhd [2001] MLJU 566 (refd)
Bruce v Odham's Press Ltd [1936] 1 KB 697 (refd)
Halim Arsyat v Sistem Televisyen Malaysia Bhd & Ors [2001] 6 MLJ 353 (refd)
Kian Lup Construction v Hongkong Bank Malaysia Bhd [2002] 7 MLJ 283 (refd)
Knupffer v London Express Newspaper Ltd [1944] AC 116 (refd)
Lee Kuan Yew v Derek Gwyn Dairies & Ors [1990] 1 MLJ 390 (refd)
Sarjit Singh Khaira, Re [1990] 1 MLJ 36 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(b), (d)

Andrew Chiew Ean Vooi (Lee Hishammuddin) for the second and third defendants.
Thara Singh Sidhu (Thara Singh Sidhu) for the second plaintiff.

Low Hop Bing J:

APPEAL

[1] Vide summons in chambers dated 30 August 2003, in encl 9, the second and third defendants ('D2' and 'D3') sought an order to strike out with costs the writ and statement of claim of the second plaintiff ('P2') under O 18 r 19(1)(b) or (d) of the Rules of the High Court 1980 (RHC) and also under the inherent jurisdiction of the court.

[2] Enclosure 9 was dismissed by the learned registrar on 5 April 2004. Against that decision, encl 37 was filed by D2 and D3 by way of an appeal to me as Judge in Chambers.

FACTUAL BACKGROUND

[3] P2's claim against D2 and D3 is primarily based on libel allegedly contained in two statutory declarations affirmed by D2 and D3 respectively on 3 May 2002.

[4] These statutory declarations also refer to the statutory declaration of the first defendant ('D1') who stated, inter alia, that all the three defendants went to the Melaka High Court on 26 June 2000 to bid for three pieces of land in a public auction, for which D1 deposited a bank draft as the bidder's deposit. References were made to P1 allegedly as an agent of a company known as Pernara Jaya Sdn Bhd ('the company') of which P2 was at the material time a director and shareholder, and that P1 had failed to pay D1, D2

and D3 the sum of money which P1 and, by implication, the company had allegedly promised in order to induce them to withdraw from bidding at the public auction.

[5] P2's claim was also allegedly based on the torts of malicious prosecution and abuse of process in the form of numerous averments pleaded in the statement of claim.

ORDER 18 R 9 RULES OF THE HIGH COURT 1980

[6] Mr Andrew Chiew Ean Vooi, learned counsel for D2 and D3, submitted that:

(1) As the statutory declarations of D2 and D3 respectively did not refer to P2, P2 could not have been libelled, referring to *Ayob Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 (HC); *Lee Kuan Yew v Derek Gwyn Dairies & Ors* [1990] 1 MLJ 390 (HC); *Abu Samah bin Omar v Zainal bin Montel*[2004] 5 MLJ 377; *The Law of Defamation in Australia and New Zealand* (The Federation Press, 1998) page 71; *Knupffer v London Express Newspaper Ltd* [1944] AC 116 at 112 (HL); *Halim Arsyat v Sistem Televisyen Malaysia Bhd & Ors* [2001] 6 MLJ 353 (HC); *Kian Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 MLJ 283; and

(2) P2's statement of claim did not plead association by reference. D2 and D3 sought support in *Gatley on Libel and Slander* (10th Edition 2004); *Atkin's Encyclopaedia of Court Forms In Civil Proceedings* (2nd Ed Vol 25, 1998); *Bruce v Odham's Press Ltd* [1936] 1 KB 697.

[7] The voluminous response of P2's learned counsel Mr Thara Singh Sidhu is that in essence P2's claim against D2 and D3 is based on the torts of malicious prosecution, abuse of process and libel and so should not be struck out.

[8] I have the opportunity to peruse the phenomenal bundles of affidavits, exhibits and submissions together with a surfeit of authorities, all of which easily measuring two feet in thickness, which the parties have considered necessary and advisable to file in an otherwise simple and straightforward application under O 18 r 19(1)(b) or (d).

[9] In my judgment, it is abundantly clear that the principles governing O18 r 19 have been set out in a long line of authorities eg *Re Sarjit Singh Khaira* [1990] 1 MLJ 36 (HC) per Haidar Mohd Noor J (later CJ (M)); and *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 (SC) per Mohamed Dzaiddin bin Hj Abdullah FCJ (later CJ (Malaysia)). Ina nutshell, the gist is that where a claim or pleading is shown to be obviously unsustainable, any limb of O 18 r 19(1) may be invoked.

[10] In relation to O 18 r 19(1)(b) or (d), I am of the view that P2's pleading or indorsement in the writ may only be struck out on the ground that it is scandalous, frivolous or vexatious ie where it is wholly unnecessary or irrelevant

or obviously unsustainable: *Boey Oi Leng v Trans Resources Corporation Sdn Bhd* [2001] MLJU 566; or it is otherwise an abuse of the process of the court.

[11] In this regard, only the authorities which bring about the striking out of eg libel or other tortious actions under O 18 r 19(1)(b) or (d) would be supportive of the contention advanced for D2 and D3, as they must prove that P2's claim or pleading comes within the provisions of O 18 r 19(1)(b) or (d).

[12] Having carefully considered all the aforesaid authorities including the opinions of the respective learned authors contained in all the textbooks cited for D2 and D3, it is my specific finding that they all touch and concern libel or defamation actions, and also the broad subject matter of libel and slander. However, I also further find that none of these authorities and opinions had ever enunciated or expounded on the striking out of pleadings or endorsements in the writ of summons under O 18 r 19(1)(b) or (d). In effect, all the judgments and opinions were delivered after full trials in which all the issues had been ventilated and resolved by reference to the facts and the law, in addition to a meticulous analysis and consideration of the evidence adduced by the respective parties therein. In the circumstances, I am unable to conclude that the authorities cited for D2 and D3 are of any assistance to them.

[13] In relation to the instant appeal, upon a proper perusal of the pleadings and affidavits together with the exhibits filed herein, I am of the view that it is eminently unsuitable for P2's claim to be struck out as they are not obviously unsustainable. Hence, they are outside the ambit of O 18 r 19(1)(b) or (d).

[14] However, whether P2 is able to show any merit in his claim against D2 and D3 remains to be determined after a full trial, for which I express no opinion here.

CONCLUSION

[15] On the foregoing grounds, I hold that the learned registrar is correct in dismissing the application of D2 and D3. I therefore affirm his decision with the result that this appeal is dismissed with costs.

COSTS

[16] Reasonable costs are to be taxed by the learned registrar of this court on the basis of the otherwise simple and straightforward interlocutory application herein. P2's bundles of authorities may be relevant, if ever, at the full trial of this action, but certainly not in this application and now this appeal before me.

Appeal dismissed with costs.

Reported by D Nesh